BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JESSE GREEN	)	
Claimant	)	
VS.	)	
	)	
HI-LO INDUSTRIES, INC.	)	
Respondent	)	Docket No. 259,707
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the Award entered by Administrative Law Judge (ALJ) Jon L. Frobish on October 21, 2002. The Appeals Board (Board) heard oral argument on April 8, 2003. Stacy Parkinson was appointed and participated as a Board Member Pro Tem.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award. The Board also considered the exhibits offered at the August 29, 2002, deposition of Fred Willard Verner, Jr.

ISSUES

The ALJ awarded claimant 50.71 weeks of temporary total disability compensation followed by 238.95 weeks of permanent partial disability compensation based on a 63 percent work disability. The work disability was arrived at by averaging a 100 percent wage loss with a 26 percent task loss. [1] The 50.71 weeks of temporary total disability included the disputed period from June 5, 2001 through September 5, 2001, but did not include the period of January 8, 2002, through January 22, 2002. The ALJ failed to address the issues of claimant's functional impairment and whether any percentage of that functional impairment preexisted claimant's June 5, 2000 accident. [2]

Respondent and its insurance carrier (respondent) raise the following issues for review by the Board:

1. What is the nature and extent of claimant's disability?
   a. What is claimant's functional impairment?
   b. Is claimant's injury an aggravation of a preexisting condition and, if so, did claimant have a rateable functional impairment before his current work-related injury?
   c. Should claimant's permanent partial disability award be limited to his percentage of functional impairment because he voluntarily quit his job with respondent or was terminated for cause?
   d. What is claimant's task loss?
   e. What is claimant's wage loss?
   f. Did claimant make a good faith effort to find appropriate employment post-injury and, if not, what is his post-injury ability to earn wages?

2. What were claimant's temporary and final restrictions?
   a. Did the ALJ err by finding Dr. MacMillan released claimant to return to work with the restriction of "no repetitive bending?"

3. Evidentiary Issues:
   a. Did the ALJ err by considering evidence concerning treatment by Drs. Burkman, King and Goldman when none of those doctors testified nor were their records admitted into the record by stipulation or otherwise?
   b. Did the ALJ err by excluding evidence offered by respondent regarding whether claimant voluntarily quit his job with respondent?

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[1] K.S.A. 44-510e(a).

[2] *See* K.S.A. 44-501(c).

4. Did claimant sustain an intervening accident and injury?

5. Is claimant entitled to temporary total disability compensation for the period June 5, 2001 through September 5, 2001?

In his brief to the Board, claimant requested that the Board affirm the ALJ's Award. But during oral argument to the Board, claimant requested review of the ALJ's denial of temporary total disability compensation for the period of January 8, 2002 through January 22, 2002. In addition, claimant argued that his task loss should be 37 percent based upon the opinion of Dr. Prostic rather than the 26 percent found by the ALJ based upon the opinion of Dr. MacMillan.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Board finds that the ALJ's Award should be modified to find claimant has a 20 percent permanent impairment of function to the body as a whole and a ten percent impairment of function that preexisted claimant's accident for which respondent is entitled to a credit, but that the Award should otherwise be affirmed.

With regard to the period of June 5, 2001 to September 5, 2001, the Board agrees with the ALJ and finds claimant is entitled to temporary total disability compensation because of his worsened symptoms and need for additional medical treatment.

But the Board finds that claimant is not entitled to temporary total disability compensation for the period of January 8, 2002 through January 22, 2002. The treating physician released claimant to return to light duty work. Despite the fact that respondent was unwilling to allow claimant to return to work during this period, claimant did not meet the statutory definition of being temporarily and totally disabled.

The medical experts that did testify specifically referred to the treatment and testing provided claimant by Drs. Burkman, King and Goldman in their testimony, without objection, and the ALJ simply repeated what was in the record from that testimony. Therefore, the ALJ did not err by referring to this treatment provided claimant by Drs. Burkman, King and Goldman even though none of these physicians testified. [3] "[K.S.A. 44-519] literally applies only when a party seeks to introduce a report or certificate of a physician or surgeon into evidence." [4] Furthermore, the medical experts considered these

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[3] *See* K.S.A. 44-519.

[4] *Boeing Military Airplane Co. V. Enloe,* 13 Kan. App. 2d 128, 130, 764 P.2d 462, *rev. denied* 244 Kan. 736 (1988).

doctors' treatment records when forming their own opinions about claimant's condition. [5] "K.S.A. 44-519 does not limit the information a testifying physician or surgeon may consider in rendering his or her opinion as to the condition of an injured employee." [6]

Respondent offered statements of several of its employees at the August 29, 2002 deposition of Fred Willard Verner, Jr. Claimant objected on the basis of hearsay. But in workers compensation proceedings, hearsay is admissible. [7] In addition, those statements were obtained in the ordinary course of employment and were part of claimant's personnel file. As such, they would fall within the business records exception to the hearsay rule in the Kansas Rules of Evidence. [8]

Respondent challenges the ALJ's statement that Dr. MacMillan released claimant to return to work with the restriction of no repetitive bending. While it is correct that Dr. MacMillan did not include repetitive bending in his initial restrictions, he ultimately added no repetitive bending to his final list of restrictions. And Dr. Prostic did as well. Accordingly, the Board agrees with the ALJ's conclusion that the accommodated work claimant was performing for respondent was outside his restrictions.

Respondent argues claimant's permanent partial general disability should be limited to his functional impairment rating as either claimant voluntarily quit or the claimant's termination was "for cause" and was unrelated to his work-related injuries.

In *Foulk,* [9] the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, [10] the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a

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[5] *See Roberts v. J.C. Penney Co.*, 263 Kan. 270, 949 P.2d 613 (1997).

[6] *Boeing* at Syl. ¶ 2.

[7] *See* K.A.R. 51-3-8(c).

[8] K.S.A. 60-460(m).

[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

In January 1998, the Kansas Court of Appeals determined in Gadberry[11] that a worker who returned to work at her pre-injury wage but within a few weeks was terminated in a layoff was not precluded from receiving a work disability award. Moreover, the Court of Appeals noted that there was no evidence that the employer was accommodating the worker with a light-duty job. [12] The Court stated, in part:

> Gadberry's return to work at the same wage that she had been receiving prior to her [January 21, 1994] injury does not preclude a finding of wage loss since she was given notice of her termination just a few weeks later, and the termination was based on an economic layoff. Pursuant to *Lee*, Gadberry became eligible for compensation on a work disability upon her termination, one component of which is wage loss. [13]

In addressing whether the principles in *Foulk* should preclude claimant from receiving a work disability, the Court stated:

> Gadberry would have continued to work at Polk if she had not been terminated. The record reflects that Gadberry applied for retirement benefits subsequent to her termination because she needed health insurance. Even after she had applied for retirement benefits, Gadberry sought employment with numerous employers within the community. Gadberry did not refuse employment it was never offered to her. [14]

Consequently, in *Gadberry* the Court of Appeals held that the worker was entitled to receive a work disability after she was terminated in an economic layoff despite returning to her regular work without accommodations.

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[11] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[12] *Id.* at 804.

[13] *Id.* at 805.

[14] *Id.* at 806.

In the 1999 *Niesz* [15] case the Kansas Court of Appeals held that a worker was entitled to receive a work disability when the worker was later terminated for reasons that were unrelated to the work injury. In that decision, the Court of Appeals held that an accommodated job artificially circumvents a work disability but once that accommodated job ends, the presumption of no work disability may be rebutted.

> Placing an injured worker in an accommodated job artificially avoids work disability by allowing the employee to retain the ability to perform work for a comparable wage. Once an accommodated job ends, the presumption of no work disability may be rebutted. [16]

> The presumption of no work disability is subject to reevaluation if a worker in an accommodated position subsequently becomes unemployed. [17]

Consequently, the Court of Appeals held that Ms. Niesz was entitled to receive a work disability after being fired, when the circumstances surrounding the termination do not demonstrate bad faith on the worker's part.

> The fact that Niesz' accommodated position ended does not mean that Niesz ceased having work restrictions. Niesz' work disability made it difficult for her to find work in the open market. The presumption of no work disability does not apply because Niesz is no longer earning 90 percent of her preinjury wages. See. K.S.A. 1998 Supp. 44-510e(a) . . . . [18]

Finally, in January 2003 the Kansas Court of Appeals in *Cavender* [19] held that a worker who had obtained other employment following a work injury was entitled to receive work disability benefits after resigning her employment for reasons unrelated to the injury. The Court reasoned that the proper test to apply in these situations is whether the worker acted in good faith to retain appropriate employment and when terminated, thereafter made a good faith effort to find appropriate employment. The Court wrote, in part:

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[15] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

[16] *Id.* at Syl. ¶ 2.

[17] *Id.* at Syl. ¶ 3.

[18] *Id*. at 740.

[19] *Cavender v. PIP Printing, Inc.*, ___Kan. App.2d ___, 61 P.3d 101 (2003).

> K.S.A. 44-510e(a) allows work disability in excess of functional impairment only if the claimant is making less than 90% of his or her preinjury gross weekly wage. If this percentage is met, K.S.A. 44-510e(a) provides the equation for computing work disability[.]
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> . . . .
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> The cases interpreting K.S.A. 44-510e have added the requirement that an employee must set forth a good faith effort to secure appropriate employment before work disability will be awarded.
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> The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis . . . . [20]
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> . . . .
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> The purpose of the good faith test, at its very core, is to prevent employees from taking advantage of the workers compensation system. **In situations where post injury workers leave future employment, the good faith test is extended to determine whether leaving was reasonable.** Clearly, in the cases cited by PIP [the employer], leaving employment was reasonable when the employment became outside physical restrictions or the changed circumstances justified a refusal of accommodated employment. **However, the reasonableness of leaving employment is not limited to a decision based on work restrictions or injuries.**
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> The present case is closest in nature, while still not on point, to those cases where an injured employee is terminated due to economic downturn and layoff and the employee is found to still be entitled to work disability. **Those cases present a situation where termination or leaving employment is unrelated to the workers compensation injury or restrictions**. [21]

And the Kansas Court of Appeals has consistently held that factors other than a worker's injury and permanent medical restrictions may be considered in determining whether a worker has acted in good faith to retain or to find employment. [22]

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[20] *Id.* at 103-104 (citations omitted).

[21] *Id.* at 105 (citation omitted) (emphasis added).

[22] *See Ford v. Landoll Corp.*, 28 Kan. App. 2d 1, 11 P.3d 59, *rev. denied* 269 Kan. ___ (2000).

In this case, the Board finds claimant did not fail to act in good faith with respondent. Accordingly, his termination does not preclude him from receiving a work disability.

Furthermore, although the Board admits into evidence and considered the affidavits attached to the transcript of the Fred Willard Verner, Jr. deposition, the Board nevertheless finds that claimant did not quit his job. The circumstances surrounding claimant's termination did not amount to a refusal to work, and claimant did not violate the policies set forth in *Foulk*. [23] Moreover, claimant's ultimate permanent restrictions would prevent him from performing his former job with respondent and it is unlikely respondent would have accommodated his final restrictions. As claimant did not fail to act in good faith either in his dealings with respondent or, given his geographic location, in his subsequent job search efforts, claimant is entitled to a work disability award based upon his actual post injury earnings. [24]

The Board adopts the ALJ's findings of fact and conclusions of law set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated October 21, 2002 is modified to reduce the Award by the ten percent preexisting functional impairment as follows:

Claimant is entitled to 50.71 weeks of temporary total disability compensation at the rate of $266.68 per week or $13,523.34 followed by 201 weeks of permanent partial disability compensation at $266.68 per week or $53,602.68 for a 53 percent permanent partial general body disability making a total award of $67,126.02. [25]

As of April 30, 2003, there would be due and owing to the claimant 50.71 weeks of temporary total compensation at $266.68 per week in the sum of $13,523.34 plus 100.57

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[23] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[24] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[25] Claimant's permanent partial disability award would be limited to his percentage of functional impairment (less the amount determined to be preexisting) while he continued working for respondent and was earning at least 90 percent of his average weekly wage. But due to the accelerated pay out formula and because there is no gap in payments and the compensation rate does not change, it makes no difference in this award. Therefore, this award simply uses the percentage of work disability to compute the total number of weeks of permanent partial disability compensation.

weeks of permanent partial disability compensation at $266.68 per week in the sum of $26,820.01 for a total due and owing of $40,343.35 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $26,782.67 shall be paid at $266.68 per week for 100.43 weeks less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of May 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation